

# Politics



## Mitigating Liability Risks under the Revised Chinese Environmental Protection Law

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### 在新修订的《中华人民共和国环境保护法》下减轻责任风险

来自Rödl & Partner的Chao Du和Sebastian Wiendieck的客邀文章

After decades of ruthless exploitation of the Chinese environment, the relatively lax People's Republic of China Environmental Protection Law (EPL) was comprehensively revised in January 2015. The reform brought several changes, significantly strengthening the legal basis for environmental protection. Due to a stricter enforcement and increase of inspection activities by the Chinese authorities, managements of companies, in particular those handling potentially dangerous substances, are well advised to be aware of necessary approvals/licenses, comply with the respective content and implement required internal organization measures – for the benefit of the company but also to minimize the risk of personal liability. This article aims to give a brief overview over the recent legal changes, most essential permits and internal organization requirements.

#### Recent legal changes and practical enforcement

One of the primary amendments of the revision of the EPL relates to the tightening of sanctions for certain environmental violations. Under the revised EPL, authorities are enabled to impose higher penalties on a recurring daily basis, thereby significantly increasing pressure on non-compliant companies. Moreover, a short-time detention of up to 15 days against responsible management staff was introduced as a new form of sanction. Besides stricter sanctions, the revised law further requires the implementation of certain internal organization requirements.

In addition to the requirement to establish an Environment Responsibility System the law now expressly stipulates the obligation of enterprises to implement Emergency Response Plans as a precaution against environmental accidents. Public participation measures were also strengthened, in particular through the extended applicability of class actions to a wider circle of environmental organizations. Although the number of

经过对中国环境几十年的掠夺式利用，原本相对宽松的《中华人民共和国环境保护法》（“环保法”）在2015年一月全面修订。改革带来了一些变化，显著加强了环境保护的法律依据。

由于中国当局更为严格的执法和检查活动的增加，建议公司的管理层，尤其是那些处理潜在危险物质的公司，了解必要的批准/许可，遵守相关的内容并实施要求的内部组织措施 — 为公司的利益，也为将个人责任的风险降到最低。本文旨在将近期的法律变化、重要许可和内部组织要求做一个简要概述。

#### 近期的法律变化和实际执行

环保法修订的一个主要修正涉及对某些环境违法行为更严格的制裁。根据修订后的环保法，当局能够重复地按天处以更高的罚款，从而对不符合要求的企业大大施加压力。此外，作为制裁的一种新形式，引入了对负责的管理人员长达15天的拘留。除了更严格的制裁措施，修订后的法律还提出实行一些内部组织要求。



Plant inspections by Chinese authorities sharply increased after the explosion in Tianjin in August 2015  
2015年8月天津爆炸案之后，中国政府部门对工厂的检查急剧增加  
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class actions until now can be considered rather low, this measure has strong potential to create pressure on polluting enterprises.

Regarding the enforcement of the revised EPL, there has been a noticeable increase compared to the rather lax enforcement of environmental regulations in the past. The enormous explosion at a container storage site in the port of Tianjin in August 2015, which was caused by the improper storage of highly dangerous chemicals and led to over 170 casualties, further triggered a rapid increase of plant inspections across the country. The investigations carried out in the aftermath of the accident can be seen as a good example on how a company's management might be subject to investigations and held responsible for violations of environmental regulations.

In Tianjin the whole management was taken into custody and subject to investigations few days after the explosion. It turned out that the company severely violated storage regulations, had operated without the required licenses in the past and had no effective emergency response system in place. Although the Tianjin accident is of exceptional scale and the investigation was closely followed by the public, it is normal practice that the management of a company will be the prior subject of investigations in the event that environmental regulations are breached – or in worst cases – accidents incurred.

### Licenses and approvals for production companies

Setting up a production site in China requires various registrations and approvals of different authorities. Besides the documents described in the following, further documents might be necessary, depending on the individual business scope.

One of the most relevant approvals, necessary for all construction projects in China, is the approval of the Environmental Impact Assessment (EIA). Construction projects in this regard relate to any erection, modification or renovation of any building. During the EIA the environmental impact of the construction and future operation of the project on the surrounding environment is assessed.

In this regard it is analyzed, whether intended projects comply with applicable environmental laws and emission standards/volumes as well as whether the installation of sufficient precaution measures is intended. The exact scope of the EIA depends on the expected en-

除了要求建立环境责任制,法律现在明确规定企业有义务落实应急预案,作为对环境事故的预防措施。公众参与措施也得到了加强,特别是通过更大范围的环保组织集体诉讼的扩展适用。虽然到目前为止集体诉讼的数量相当低,但这一措施在对污染企业施加压力方面有很大潜力。

关于修订环保法的执行,相比过去环境法规执法不严的情况有明显增强。2015年8月由于高度危险化学品保管不当导致超过170人伤亡的天津港集装箱存储区巨大爆炸事件,进一步引发了全国各地工厂检查的急剧增长。事故发生后进行的调查可以看作是对公司的管理层如何会受到调查并对违反环保法规担责的范例。

在天津爆炸发生数天后整个管理层均被拘留并受到调查。原来该公司严重违反存储规定,过去一直无证经营且没有有效的应急体系。虽然天津事故是例外且公众密切关注该调查,但通常违反环保法规 — 或在最坏的情况下 — 事故发生时公司的管理层将首先成为事件调查的对象。

### 生产企业的许可和审批

在中国设立生产基地需要不同主管部门的各种登记和审批。除了下面提到的文件,可能还需要其他文件,这取决于各自的经营范围。

对中国所有建设项目必需的最相关的一个审批,是环境影响评价(“环评”)的审批。在这方面的建设项目涉及任何建筑物的任何建造、改造或更新。在环评中会对施工和项目今后的运作对周围环境的影响进行评估。



*Prior to starting production in China, various approvals and licenses of different authorities are required*

开始在中国进行生产之前,需要取得不同政府机关要求的各类批准和许可  
Source / 图片来源: panthermedia.net / scanrail

vironmental impact. Whereas for small scale projects with very low emissions the registration of a mere EIA assessment form is sufficient, large scale projects with high emission output generally require the creation of a comprehensive EIA report by a specially licensed institution.

Concerning the competent authority for submission of the EIA-Forms or Reports, the provincial governments or local Environmental Protection Bureaus are responsible, unless certain investment limits are exceeded which start at USD 50 million. Due to the fact that substantial changes in the manufacturing process might require a new environmental assessment, it should be ensured on a continuous basis that the actual business operations are in line with the activities stated and approved in the EIA.

Oftentimes neglected by the local authorities as well as respective companies is the issuance of a Project Completion Approval. Prior to the start of business operation, the competent Environmental Protection Bureaus shall perform the acceptance of the respective facility by inspecting submitted documentation as well as factual circumstances. The application for "Approval Inspection" shall generally be submitted within three months after trial operations. The scope of the inspection includes the functionality of environmental protection measures and monitoring systems, the successful conduction of the Environmental Impact Assessment, the feasibility of emission volume limits as well as the full remediation of environmental damages incurred during the constructing process. Regarding necessary supporting documents to be submitted for the Approval Inspection, the required scope depends on the scope of the Environmental Impact Assessment. Usually a form or report has to be prepared by a licensed Environmental Monitoring Institution. Due to the fact that the exact requirements and procedures in this regard vary throughout the different provinces, clarification with the competent authorities is strongly advised.

Of particular importance prior to the start of business operation is an inquiry with the local authorities regarding the issuance of a Pollution Discharge Permit. Pollution Discharge Permits stipulate the specific types of pollutants emitted by a respective enterprise as well as the corresponding emission limits. The permits thereby serve as an allocation instrument of the competent authorities for specific pollutants and limit the total emission in certain regions. Generally, the obtainment of such permits is required for all companies that emit pollutants prior to the start of business operation.

在这方面会分析拟建项目是否符合适用的环境法规和排放标准/容量以及是否配备足够的预防措施。环评的具体范围取决于预期的环境影响。而对于非常低排放的小规模项目,仅登记环评评估表就够了,对于高污染物排放的大型项目一般需要由专门的许可机构出具一份全面的环评报告。

关于提交环评表格或报告的主管机关,由省级政府或地方环保局负责,除非超出50万美元起始的投资限额。由于在生产过程中大的变化可能需要一个新的环境评估,应确保实际业务操作在连续的基础上均符合环评中声明并核准的活动。

地方当局及相关公司经常忽视工程竣工验收的签发。在企业正式运营前,主管环保局应通过检查提交的文件以及实际情况,对所属设施进行验收。通常应于试运营后的三个月内,提交“批准检查”的申请。

检查的范围包括环境保护措施和监测系统的功能,环境影响评估的成功实施,排放量的限制以及对建设过程中所产生的环境损害所进行全面整治的可行性。关于须提交审批检查所需的证明文件,其所规定的范围取决于环境影响评估的范围。通常,表格或报告必须由具备许可证的环境监察机构编制。由于不同的省份在这方面的确切要求和程序各不相同,强烈建议与主管部门核实。

特别重要的是,在经营开始前,应向当地有关部门做一个关于排污许可证签发的咨询。排污许可证规定了各企业排放污染物的具体类型以及相应的排放限制。



*Especially in provinces with "chronic" water or air pollution special attention should be applied to a Pollution Discharge Permit  
尤其是受到慢性水污染或空气污染的省份, 特别要注意应使用污染排放许可  
Source / 图片来源: Dieter Schütz / pixelio.de*

Nevertheless, in practice the content and extent of the licenses varies across the different regions in China. Against this background it is important to inquire with the competent authorities whether such permits are issued and if sufficient emission quota is available for the intended production activities. Especially in provinces with “chronic” water or air pollution, e. g. Beijing and Hebei-Province, special attention should be applied in this regard.

### Internal organization requirements

The revised EPL requires companies that discharge pollutants to implement an Environmental Protection Responsibility System. Such companies have to stipulate a responsible person in charge of environmental related issues. Although the law does not contain many details as to the qualifications of the responsible person or specific duties, it is recommended to appoint a person with relevant background for this position that is involved in the continuous supervision of the production activities.

Moreover, such person should ideally be employed on site, so he/she is able to react to any irregularities in the production process and is also available as a point of contact for the authorities if inspections are carried out. The responsibilities of the person in charge should be clearly documented as well as any activities such as

因而该许可证充当了主管部门对具体污染物及在某些地区限制总排放量的分配工具。

通常情况下,所有在经营开始前排放污染物的企业均应获取该项许可证。然而,实践中,在中国的不同地区,许可证的内容和范围也各不相同。在此背景下,询问主管机关是否签发此种许可证,且是否有足够的排放配额可用于预期的生产活动,显得尤为重要。特别在“长期”水或空气污染的省份,如北京市与河北省,应更重视该方面的适用。

### 内部组织要求

修订后的环保法要求对排放污染物的企业实行环保责任制。这些企业必须设定一位负责环保相关事务的负责人。虽然法律并未详细规定有关负责人的资格或具体职责,但建议任命一位对该职位有相关背景的人,参与生产活动的持续督导。

此外,理论上该人员应在当地被雇用,以便他/她能够对生产过程中的任何违规行为作出反应,且也可以作为当地机关进行检查时的联络人。该负责人的职责及对环保设备的定期评估,对该设备的维修保养等所有活动均应进行明确记载。在任命能胜任该职位的人员及监督该人员上的失误,可能会导致他/她的上司甚至该公司的法定代表人承担个人责任。



*Companies using or storing hazardous chemicals should in particular ensure to comply with internal organization requirements*  
使用危险化学品或者对危险化学品进行仓储的公司尤其应当保证符合公司内部要求  
Source / 图片来源: panthermedia.net / Baloncici

regular assessments of the environmental protection equipment, maintenance of such equipment etc. Failures in appointing a capable person or to monitor that person may result in personal liabilities of his/her superiors up to the legal representative of that company.

Additionally, according to the revised EPL and further specified by administrative measures, enterprises that handle or store dangerous chemicals or for any other reason carry the risk of potential environmental accidents, are required to formulate and file Emergency Response Plans with the competent Environmental Protection Bureau. Regarding the content of Emergency Response Plans, the law requires to stipulate immediate counter measures to be taken in the event of an emergency situation. In order to determine which measures are suitable, the individual circumstances of each case need to be closely analyzed.

In this regard aspects such as the used production materials, the internal production layout and the kind of surrounding environment need to be taken into account. In addition to counter measures, the law also requires to stipulate how affected residents and entities in close proximity to the company's premises as well as the relevant authorities shall be informed. Moreover, the internal organization for emergency cases, such as assignment of responsibilities, appointment of contact persons and stipulation of reporting lines have to be codified. To facilitate the cooperation with the authorities in emergency situations, the Emergency response Plan should furthermore be aligned to the respective Emergency Response Plans of the local authorities.

## Conclusion

After the revision of the Environmental Protection Law of the People's Republic of China and a noticeable improvement of enforcement activities, companies are strongly advised to comply with relevant regulations. Although the environmental standards applied by many foreign invested enterprises are often above the average standard, it is nevertheless recommended to regularly assess, whether business operations are still in line with the obtained approvals/licenses and if the respective internal organization requirements are met. Both aspects can become particular important in the event of environmental accidents. The more it can be proved in such situations that operations complied with relevant regulations and that coordinated emergency measures were taken to reduce environmental damage, the better the chances to mitigate sanctions.

此外,根据修订后的环保法及行政措施的进一步明确规定,处理或储存危险化学品的,或因任何其他原因存在潜在环境事故风险的企业,应制定应急预案并向主管环境保护局备案。关于应急预案的内容,法律要求规定在紧急情况下立即采取的应对措施。为了确定哪些措施是合适的,需密切分析每个案件的个别情况。



*Enterprises that carry the risk of potential environmental accidents are required to formulate and file Emergency Response Plans*  
存在潜在环境事故风险的企业,应制定应急预案  
Source / 图片来源: Hasan Anac / pixello.de

如在所使用的生产材料,内部生产布局和周围环境的类型方面需要考虑在内。除应对措施外,法律要求明确对该企业住所附近的居民和单位的影响情况,并告知有关部门。

此外,对于紧急情况下的内部组织架构,如职责分配、联系人的任命和报告途径的规定应编纂入册。为了方便与有关部门在紧急情况下的合作,该应急预案应与地方部门的应急预案相一致。

## 结论

在《中华人民共和国环境保护法》的修订及执法活动的明显改善后,强烈建议企业遵守有关规定。虽然许多外商投资企业所适用的环境标准往往高于平均水平,但仍建议对企业经营是否符合已获得的批准/许可,且是否符合相应的内部组织要求进行定期评估。若发生环境事故,这两个方面将变得尤为重要。在这种情况下,越充分证明运营符合相关规定,且已采取协调应急措施以减少环境损害,越有机会减轻制裁。